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IN THE

# Supreme Court of the United States

OCTOBER TERM 1975

No. 74-1487

UNITED STATES OF AMERICA,

*Petitioner,*

v.

COLIN F. MacCOLLOM,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF FOR RESPONDENT

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## BRIEF FOR RESPONDENT

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The opinions below and jurisdictional statement are set forth adequately in Petitioner's Brief at page (1).

## QUESTIONS PRESENTED

The question presented on certiorari is somewhat narrower than as stated in Petitioner's Brief p. (2):

Whether an indigent federal prisoner who did not appeal his conviction, whose original trial counsel has

been replaced by new counsel, and who alleges general constitutional error of denial of effective assistance of counsel and lack of sufficient evidence to support his conviction is entitled to a free verbatim transcript of his trial in aid of a habeas corpus proceeding.

## ADDITIONAL CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

First Amendment –

> "Congress shall make no law . . . abridging the right to the people . . . to petition the Government for a redress of grievance."

Article I, § 9 Cl. 2 –

> "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it."

28 U.S.C. § 753(b) –

> "One of the reporters appointed for each such court shall attend at each session of the court and at every other proceeding designated by rule or order of the court or by one of the judges, and shall record verbatim by shorthand or by machanical means . . . (1) all proceedings in criminal cases had in open court; . . . (3) such other proceedings as a judge of the court may direct or as may be required by rule or order of court or as may be requested by any party to the proceeding."

## STATEMENT

After a two day jury trial in the United States District Court for the Western District of Washington,



respondent was convicted of uttering forged currency, in violation of 18 U.S.C. 472. On June 4, 1970 he was sentenced to a term of ten years imprisonment. His court-appointed attorney, Respondent being indigent then and at all times since, advised him not to appeal since "it would interfere with a motion to modify sentence." Subsequently on July 6, 1971, the district court denied respondent's motion for modification of his sentence.

Shortly after his original sentencing respondent was incarcerated at McNeil Island Federal Penitentiary in Washington and then transferred administratively to Leavenworth Penitentiary in Leavenworth, Kansas. (App. 9). Shortly after his arrival there, and prior to his being informed of the district court's denial of his motion to modify his sentence, respondent contacted a prison legal services project being run by the University of Kansas Law School and requested aid in preparing a habeas corpus petition for relief.

At this time, respondent was incarcerated in a maximum security, solitary confinement cell, where he remained during all the relevant proceedings in the district court. A second year law student, Laurence Yackle,[1] attempted to assist respondent in preparing a 28 U.S.C. 2255 petition. Because of the conditions under which respondent was incarcerated, the lack of availability of the original trial counsel, the lack of any trial notes or other memoranda from the trial, Mr. Yackle assisted respondent in requesting a transcript from the district court in order to frame his claims of constitutional error.

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[1] Presently assistant professor of Law at the University of Alabama; author of "Indigent's Right to a Transcript of Record" 20 Kan. L. Rev. 746 (1972).

After correspondence between respondent and the district court, (app. 6-7, 10-12) local counsel was appointed to assist in the claim for a transcript and for § 2255 relief. Local counsel was equally unable to contact the original trial counsel and the present proceeding for a transcript was continued in the absence of any other means of asserting respondent's claims of ineffective assistance of counsel and lack of sufficiency of the evidence.

Following counsel's appointment (App. 3-4) a hearing on the government's motion to dismiss was held on January 12, 1973 and the government's motion granted without hearing argument. Respondent timely appealed. At the oral argument before the Court of Appeals, counsel for respondent advised the Court that he could not, [in the absence of any other trial record], assert that sufficient grounds existed for a successful claim of either constitutional error raised by respondent until counsel has reviewed a transcript of the trial.

A Ninth Circuit panel, Judge Alfred Goodwin for the majority, reversed holding that an indigent federal prisoner who has not exercised his right of appeal is entitled to a transcript of his trial in order to assist him in the preparation of his post-conviction relief motion under 28 U.S.C. § 2255 (Pet. App. 19a). Subsequently a petition for rehearing *en banc* was denied with five dissenting votes. (Pet. App. 23a-24a).

At all times, the following facts as pled by Respondent at the district court were assumed to be true in order to rule upon the original government's motion to dismiss and for the issues to be reviewed by the Ninth Circuit and this Court.



(1) Appellant is indigent.

(2) Appellant's belief that the sought for transcript would assist him in preparation of his § 2255 proceeding by revealing lack of effective assistance of counsel at trial and insufficiency of the evidence to sustain appellant's conviction, was a good faith belief and not frivolous.

(3) Appellant had no effective alternative to the transcript since his memory, personal notes, etc., were inadequate to provide the requisite information.

(4) Appellant did not appeal his original conviction.

## SUMMARY OF ARGUMENT

The Court of Appeals below held, and Respondent here asserts that a federal indigent prisoner, who alleges constitutional error of a general nature, who is represented by new counsel for his 28 U.S.C. § 2255 proceeding, and who has not appealed his original conviction is entitled to a verbatim transcript at public expense help him prepare his § 2255 or habeas corpus petition.

I. The policy considerations relied upon by the Ninth Circuit Opinion in reaching this conclusion did not depend upon a mandated equality of legal services to be provided to wealthy and indigent individuals, (Pet. Br. 7-8) but rather upon an adequate opportunity for access to habeas corpus relief for indigents as well as wealthy petitioners. (Pet. App. p. 16a).

28 U.S.C. § 2255 proceedings are the sole remedy for federal prisoners and § 753, construed as the Government asserts, requires a prior showing of specified need

and a certificate of non-frivolity before a transcript may be provided to a petitioner such as MacCollom. At the same time, a showing of non-frivolity under § 2255 requires citation of error to the record in the petition or else it will be dismissed as frivolous, a "Hobson's choice" has been created. MacCollom cannot cite to specific error occurring at a particular place in the trial without a transcript since his good faith allegations are of ineffective assistance of counsel and lack of sufficiency of the evidence to convict. But if he files his petition without such citation, he will be dismissed as frivolous.

II. Accordingly the Ninth Circuit analyzed the history of § 2255 and § 753(f) and concluded that the addition of the certificate requirement and specifications of need language of 753(f) did not apply to the narrow class of petitioners represented by MacCollom. The history of the inclusion of this section and its apparent internal inconsistencies warrant the construction of the statute adopted by the Ninth Circuit allowing a prior application for a transcript by a potential § 2255 petitioner where the alleged error can only be shown by a full transcript. To do otherwise results in a suspension of the Writ of Habeas Corpus.

III. Assuming that the Government's construction of 753(f) is adopted to bar such prior access to a transcript, the application of 753(f) denies petitioner due process of law by unduly encumbering his original habeas corpus proceeding. Cases of this Court, *Ross v. Moffitt*, 417 U.S. 600, *Britt v. North Carolina*, 404 U.S. 226, and *Griffin v. Illinois*, 351 U.S. 277, require a balancing of the nature of the indigent litigant's rights against the governmental interests of conserving costs and screening frivolous appeals. These cases lead to the



conclusion that an indigent federal prisoner who alleges constitutional error in the only constitutionally guaranteed review available to him is entitled to a verbatim transcript to aid his new counsel or himself to prepare his application for relief pursuant to Art. I, Sec. 9, cl. 2 or 28 U.S.C. 2255 where no other adequate alternative exists.

IV. The Government's construction of 753(f) also denies Respondent his due process rights to equal protection of the laws. *Griffin, supra; Ross, supra.* These cases indicate that where there is a constitutionally guaranteed review procedure, Art. I. Sec. 9, cl. 2, and no adequate alternative to a transcript, such must be provided. Accordingly, the decision below should be affirmed.

## ARGUMENT

### An Indigent Federal Prisoner Who Has Not Appealed His Original Conviction, Who Alleges Constitutional Error for His Trial, And Who Has New Counsel For His Post-Conviction Relief Proceeding, Is Entitled To A Verbatim Transcript to Prepare His Petition.

This case presents one facet of the question reserved by this Court in *Wade v. Wilson*, 396 U.S. 282; and *Britt v. North Carolina*, 404 U.S. 226: to what degree and under what circumstances must the federal government afford a verbatim trial transcript to a federal prisoner pursuing post-conviction relief?

At the outset, Petitioner has asserted that the decision of the Ninth Circuit below is in clear conflict with the decisions of other courts of Appeal, (Pet. Br.

12-13). Respondent respectfully disagrees and submits that each of the cases relied upon by Petitioner is distinguishable.[2] However, it is clear that a substantial

[2]Petitioner has cited six Courts of Appeals with allegedly conflicting decisions:

> Six other courts of appeals have addressed the issue in federal cases. *See Benthiem v. United States,* 403 F.2d 1009 (C.A. 1), certiorari denied, 396 U.S. 945; *United States v. Shoaf,* 341 F.2d 832 (C.A. 4); *Cowan v. United States,* 445 F.2d 855 (C.A. 5); *Bentley v. United States,* 431 F.2d 250 (C.A. 6), certiorari denied, 401 U.S. 920; *Culbert v. United States,* 325 F.2d 920 (C.A. 8); *Martinez v. United States,* 344 F.2d 325 (C.A. 10). (Pet. Br. 12-13).

Without exception, all of the cases cited are pre-*Britt v. North Carolina,* 404 U.S. 226 (1971), the most recent decision of this Court which specifically reserved the broader question asserted by Petitioner. Petitioner has cited no post-*Britt* case which is in conflict with the opinion of the Ninth Circuit.

In the First Circuit Case cited by Petitioner, *Benthiem, supra,* the petitioner therein filed a § 2255 motion prior to the application for a transcript. A full hearing on said motion was had and the application for a transcript was made after the hearing on the merits had been concluded. At the hearing, where the only asserted error was the lack of assistance of counsel at trial, the reviewing court had before it an affidavit of the original trial counsel setting forth his efforts on Petitioner's behalf, a government memo attesting to the competence of the trial attorney, and a concurrence by the appointed counsel for the petitioner that the original trial lawyer had not been incompetent.

Respondent herein, did not have such a hearing, no record of the frivolity of his assignments of error existed and the opposite was taken as true by the court in order for the motion to dismiss to be ruled upon. In other words, there was no record before the Court herein for dismissal of the underlying § 2255 proceeding as there was in *Benthiem* which justified the conclusion that a transcript would not be of assistance to the petitioner therein.

In the Second Circuit case cited by Petitioner, *U.S. v. Carella, supra,* the facts are radically different from the Respondent

*(continued)*



difference of approach to the policy and function of post-conviction relief is reflected between the Ninth Circuit and other courts of appeals. Accordingly,

*(footnote continued from proceeding page)*

herein. In *Carella,* the issue was not availability of a transcript of a trial to aid in post-conviction relief proceedings, but rather a complete transcript of a prior mistrial to aid in preparation for a second trial. *Carella* asserted that he needed the transcript to aid him in cross-examination of government witnesses. In lieu of this complete transcript, Carella had been given a partial transcript including all of the prosecution's direct witnesses testimony and had available trial counsel's notes of all testimony, grand jury testimony and § 3500 statements of witnesses. No allegation of need for the complete transcript was presented. Respondent herein, however, had none of these alternatives available and was seeking the transcript not for some hypothetical purpose but specifically for the preparation of his § 2255 proceeding.

The Fourth Circuit case of *U.S. v. Glass, supra* is not in conflict since Glass had plead guilty to the original charges and the basis of his § 2255 proceeding was not trial error but promises made to induce the guilty plea. No allegation of the necessity of the transcript to aid in presentation of this issue was made. Further, the district court in *Glass* did not rule upon the *in forma pauperis* application of *Glass.* The Fourth Circuit simply noted this apparent lack of necessity and remanded the case for a determination of the merits of the § 2255 claim. Respondent herein, however, has alleged his good faith belief that his transcript is necessary for the preparation of his non-frivolous claims of error and no alternative source is available to him.

Similarly, in *United States v. Schoaf, supra,* no allegation of error at trial was contained in the petitioner's request for transcript. The Fourth Circuit remanded for a determination of the necessity of a transcript since the lack of error alleged by *Schoaf* did not make it clear whether a transcript was appropriate. Respondent herein has alleged that this error which is in good faith asserts, can only be determined with the aid of a transcript. *Schoaf* is not only pre-*Britt* but precedes most of the case law development on right to transcript. *See* opinion below. p. 3-10.

The Fifth Circuit case cited by Petitioner, *Cowan v. United States, supra,* is per curiam opinion without discussion of the

*(continued)*

Respondent demonstrates that the opinion below properly reflects the balance of rights of indigents and the constitutional demands of due process of law, equal

*(footnote continued from proceeding page)*

facts or law applied other than to string cite earlier authority which, as does *Cowan* predates *Britt* and apparently is no different than those cases discussed, *supra*, in other circuits. (*See Skinner v. United States*, 434 F.2d 1036 a blanket assertion by the Petitioner of an absolute right to a transcript without any alleged error noted.) Respondent herein has alleged error and the necessity of the transcript for such error.

In *Bentley v. United States, supra*, the Sixth Circuit denied a request for transcript in a post-conviction relief motion where there had been an appeal taken from the original trial and stipulated facts and issues in lieu of a transcript had been agreed upon. In the subsequent post-conviction relief request for transcript by *Bentley*, no allegation of error was contained which indicated a need for a transcript rather than the original stipulation. Again, Respondent's factual setting and allegations are not on point.

Similarly, in the Eight Circuit case cited by Petitioner, *Culbert v. United States, supra*, the alleged error was limited solely to the asserted incompetency of counsel at trial and the request for a transcript occurred *after* the denial of the § 2255 application on the merits. In other words, unlike Respondent herein, a litigation of the frivolity of the alleged error occurred prior to the request for transcript. The Eighth Circuit opinion relied heavily on *United States v. Glass, supra*, discussed *supra*.

Lastly, the Tenth Circuit case cited by Petitioner, *Martinez v. United States, supra*, recites that the alleged errors asserted by the Martinez "defy intelligent analysis." No further discussion of allegations or relevancy of a transcript is made. Apparently this request for a transcript in the collateral proceeding was made only on appeal from the denial of the § 2255 motion and was asserted as a general right. Respondent, herein asserted both specific error for which the transcript was required and requested the transcript prior to the district court ruling on the § 2255 application.

*(continued)*



protection of the law, and access to Art. I, § 9, cl. 2 post-conviction relief.

## I.

## THE POLICY OF THE NINTH CIRCUIT OPINION, WHEN CONFINED TO RESPONDENT'S CLASS OF INDIGENT PRISONERS, PROPERLY BALANCES THE SCREENING OF FRIVOLOUS CASES AND ADEQUACY OF POST-CONVICTION RELIEF.

The underlying policy of the Ninth Circuit and that urged by Respondent to this Court is to provide an effective means to exercise the right to collateral review (Pet. App. 13a-19a).

For federal prisoners such as MacCollom, the only means of review available is collateral review by habeas corpus guaranteed by Article I, Sec. 9, cl. 2 through 28 U.S.C. § 2255, where no original appeal was taken from their convictions. Since such review is subject to general

*(footnote continued from proceeding page)*

The actual and narrow holding of the Ninth Circuit is not in conflict with the specific holdings of the other circuits cited by Petitioner. Rather, the only conflict is in the degree of showing of necessity required for production of a transcript. The opinion below simply asserts that an adequate showing under *Wade v. Wilson*, 396 U.S. 282 (1970) and *Britt v. North Carolina, supra*, is accomplished where a good faith assertion of trial error is made, the District Court makes the § 1915 certification of non-frivolity, and the petitioner is indigent. Petitioner submits that such a holding is consistent with the *Wade* and *Britt* decisions which are the latest statements by the Court and which post-date the case law relied upon by Petitioner.

*in forma pauperis* provisions including 28 U.S.C. § 753(f) as amended in 1965, which states in pertinent part:

> "... Fees for transcripts furnished in proceedings brought under section 2255 of this title to persons permitted to sue or appeal in forma pauperis shall be paid by the United States out of money appropriated for that purpose if the trial judge or a circuit judge certifies that the suit or appeal is not frivolous and that the transcript is needed to decide the issue presented by the suit or appeal."

Respondent's case presents this Court with a two fold problem of statutory analysis: (1) What is the meaning of the language of 753(f) apparently requiring certification and specification of need to be shown by a petitioner pursuant to 28 U.S.C. 2255 prior to a transcript being made available, and (2) if such language is construed (as the Government asserts) to require both a showing of non-frivolity and particularized need before a transcript will be provided, is 753(f) constitutional? The statutory interpretation is treated in depth at § II, *infra* and the major constitutional arguments at § III and IV *infra* and will not be repeated here. The Ninth Circuit, in attempting to resolve both questions relied heavily on the following policy considerations which Respondent submits should be controlling to this Court: (Pet. App. 13a-19a):

(1) Federal Habeas Corpus and its statutory equivalent for federal prisoners are a primary right guaranteed by Art. I § 9, cl. 2 of the Constitution. Section 2255 proceedings are the exclusive remedy provided by Congress for federal prisoners to exercise their Article I, § 9, cl. 2 rights. A federal prisoner exercising his § 2255 review must cite specific error in the record or his



application will be dismissed as frivolous without hearing. Such dismissal is a bar to further applications.[3]

(2) Federal Prisoners such as MacCollom who have not appealed their original trials and who are now barred from appeal have no other remedy than § 2255 for relief.

(3) The availability of a transcript to an indigent federal prisoner is of even greater importance for § 2255 proceedings because of this bar to subsequent applications for relief and because the prisoner is remote in time and often in place from the trial, original trial counsel, and access to records of the trial.

(4) There can be no adequate substitute for a transcript under the circumstances of MacCollom's petition where the allegations are of inadequacy of counsel and insufficiency of the evidence which require the entire record to be produced for review, otherwise such constitutional claims can never be raised by MacCollom under the statutory schemes.

(5) A contrary result will bar the small class of litigants such as MacCollom from any review of their trial.

Additional policy factors to be considered include the ability of the federal courts to adequately screen federal § 2255 proceedings where no transcript references can be reviewed to see if allegations are supported and the relative costs of litigation of transcript questions. (Pet. App. p. 9a-10a).

In opposition, the Government argues that 753(f) requirements must apply across the board to habeas corpus and § 2255 proceedings alike and do not unduly bar access to indigent prisoners. Central to the

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[3] See generally Note, "The Indigent's Right to a Transcript of Record," 20 Kan. L. Rev. 746 (1972).

Government's position is the assertion that post-conviction relief is secondary, both constitutionally and in importance to the opportunity for direct appeal. The Government argues that only a single "... fair opportunity for review" need be provided and the "Respondent has been afforded such an opportunity" since he "could have appealed." (Pet. Br. p. 7-8, 9, 10). Even further the Government argues that collateral attack is available for only "a very limited role ... in our system of justice," (Pet. Br. p. 26).[4]

The Government then argues that regardless of the inadequacy of Article I, Sec. 9, cl. 2 relief when modified by § 753(f) requirements, intentional bypass doctrine cures any denial of access since appeal was not exercised. (Pet. Br. 9).

Lastly, the Government argues that screening frivolous cases and costs to the system of justice justify such restrictions regardless of impact upon the individual petitioner or the class individuals including MacCollom. (Pet. Br. p. 33-35).

The Government's analysis of the relationship between post-conviction relief and appeal from conviction stands their constitutional relationship on its head. Nowhere in the constitution or in case law is appeal guaranteed, *Ross v. Moffitt*, 417 U.S. 600, *McKane v. Durston*, 153 U.S. 684. On the contrary, habeas corpus is the only guaranteed means of review in the constitution, Art. I § 9 cl. 2. Additionally, the function of habeas corpus was to go beyond appeal

[4] Apparently the quoted language at p. 26 of Pet. Br. is out of context in *Kaufman v. United States*, 394 U.S. 217, 223-224 since the text of 223-224 goes on to note that such review is for all constitutional errors.



remedies because of the availability of evidentiary hearings, *Townsend v. Sain*, 372 U.S. 293; and *Kaufman v. United States*, 394 U.S. 217. To argue, as the Government must to avoid constitutional challenge to § 753(f), that habeas corpus is an afterthought, an easily dismissed remedy, is to deny both the relative constitutional status and historical purpose of the Writ. *Smith v. Bennett*, 365 U.S. 708.

This argument is further extended (Pet. Br. 10-25) to a "bypass" argument relying heavily on the so-called rule that the writ of habeas corpus and § 2255 "will not be allowed to do service for an appeal." *Sunal v. Large*, 332 U.S. 174, 178 (1947). But the rule of *Sunal* and *Davis v. United States*, 417 U.S. 333 is limited to nonconstitutional claims. As the government concedes (Government's Brief at 26) collateral attack is designed to test only "the very gravest allegations" of error, i.e. constitutional error. *Townsend v. Sain*, 372 U.S. 293, 312; *Kaufman v. United States*, 394 U.S. 217, 223-24. The MacCollom motion has alleged inadequate representation of counsel and insufficiency of the evidence, both of which rise to the level of constitutional error. Although the requisite standard of proof may be rigorous [usually, the standard is whether counsel's incompetence rendered the trial a "farce and a mockery." See, e.g. *Jones v. Huff*, 80 U.S. App. D.C. 254, 152 F.2d 14 (1945)],[5] if that standard is met, foreclosing the prisoner from asserting his Sixth Amendment right to counsel by finding a "deliberate bypass" would be an egregious constitutional deprivation.

[5] The standard expressed in *United States v. DeCoster*, 487 F.2d 1197 (C.A.D.C.) and *Beasley v. United States*, 491 F.2d 687 (C.A. 6) is still the minority view.

All the cases cited by the government in its "deliberate bypass" argument are inapposite. The error alleged in *Sunal*, pertained only to an unfavorable evidentiary ruling on certain proffered evidence, and was unquestionably nonconstitutional error. 332 U.S. at 182. Similarly, in *Hill v. United States*, 368 U.S. 424, 426, the defendant alleged only that he had been denied the right to make a statement at his sentencing hearing. The Court concluded:

> "The failure of a trial court to ask a defendant represented by an attorney whether he has anything to say before sentence is imposed is not of itself an error of the character or magnitude cognizant under a writ of habeas corpus." at 428.

The Court in *Townsend v. Sain*, 372 U.S. 293, when faced with the question of whether federal courts hearing state prisoners' habeas petition could take evidence relevant to unconstitutional detention, refuted the notion that the role of habeas can be subsumed into appellate review.

> "The whole history of the writ - its unique development refutes a construction of the federal courts' habeas corpus powers that would assimilate their task to that of courts of appellate review. The function on habeas is different. It is to test by way of an original civil proceeding, independent of the normal channels of review of criminal judgments, the very gravest allegation . . . The language of Congress, the history of the writ, the decisions of this Court, all make clear that the power of inquiry on federal habeas corpus is plenary."

As the Court pointed out in *Kaufman v. United States*, 394 U.S. 217 at 223, when habeas relief is sought based on a constitutional claim, the rule of



*Sunal* is inapplicable. That district was recognized in the *Sunal* opinion itself. 332 U.S. at 182. For all of the above reasons, the Court should reject the "deliberate bypass" argument.

Even if the "deliberate bypass" rule is applied to these facts, the Court should be reluctant to find that an indigent prisoner knowingly and intelligently waived his right to an appeal. One survey of § 2255 motions in the D.C. Circuit showed only nine of thirty-five § 2255 movants had had prior recourse to the appellate courts. G. Velman, 69 W. Va. L. Rev. 277, 283, n.45 (1967). That commentator suggested that the reason errors were "not raised on appeal lies in defects in availability of appeals to indigents." Id. at 283. See also Comment, Right to Counsel in Criminal Post Conviction Review Procedure, 51 Calif. L. Rev. 970, 974-76 (1963). Although counsel appointed for the first time on appeal can obtain a transcript under *Hardy*, the fact remains that an indigent prisoner does not have the assistance of counsel in preparing a motion for leave to appeal *in forma pauperis*. Thus, if a § 2255 petitioner fails to appeal, that should not bar him from seeking collateral relief when his claims are of constitutional stature. Cf. *Coppedge v. United States*, 369 U.S. 441.

Other arguments raised by the Government are focused on the costs to the criminal justice system of providing transcript and were adequately addressed by the opinion below. (Pet. App. 16a-19a); Note, "Rights to a Trial Transcript" 7 Conn. L. Rev. 479 (1975).

The Respondent submits that these policy considerations militate in favor of providing MacCollom and other similarly situated federal prisoners with transcripts to guarantee adequate post conviction relief and to allow adequate screening of frivolous and time

consuming prisoner applications by requiring a complete record before consideration of their petitions is made.

## II.

## THE NINTH CIRCUIT'S CONSTRUCTION OF 28 U.S.C. § 753(f) IS A REASONABLE ATTEMPT TO AVOID THE CONSTITUTIONAL IMPLICATIONS OF THE GOVERNMENT'S POSITION.

Although the history and purpose of § 753(f) are not a model of clarity and the Ninth Circuit's interpretation may be criticized,[6] it is a reasonable attempt to avoid constitutional attacks on the statute by resolving the ambiguity of the legislative history.

### A. Legislative History of 28 U.S.C. § 753(f)

28 U.S.C. § 753(f) was first enacted in 1948, but was largely the product of the Judicial Conference of the United States study of the Court Reporter System in the early 1940s. The conference appointed a subcommittee, consisting of Circuit Judges Parker, Hicks, and Phillips to study the problem of compensation of court reporters. This committee reported to the conference in 1941, and bills were introduced in the House and Senate in 1943. The provision providing transcripts to

[6]See "The Scope of the Indigent Prisoner's Right to a Trial Transcript" 7 Conn. L.Rev. 495-499 (1975) and Meyer and Yackle "Collateral Challenges to Criminal Convictions" 21 Kan. L.Rev. 259-264, (1973).



indigents, later to become § 753(f), received a good deal of attention during the congressional hearings on H.R. 3142 and S. 620. Mr. Hobbs of Alabama, Chairman of Subcommittee No. 4 of the House Committee on the Judiciary questioned Mr. Henry P. Chandler, director of the Administrative Office of the United States Courts:

> Mr. Hobbs: . . . What do you think of the fees that would be permitted under this bill?
> Mr. Chandler: [After first misunderstanding Mr. Hobbs' question] Mr. Chairman, if a party is really a poor litigant, he can obtain transcript without charge. I think that the courts are pretty liberal in allowing a petitioner to sue as a poor person. If that leave is given and if also in a civil case the judge certifies that the appeal is not frivolous, that would carry his right to transcript without charge.

Thus, it was undisputed that there was no certification requirement in criminal or habeas cases, but only in other civil cases, as § 753(f) was originally drafted. To the same effect, see the letter from Judge Parker to Mr. Chandler at page 11 of hearings report S. 620. Since 753)f) was enacted prior to § 2255 the draftsmen of the former statute did not contemplate any certification requirement. Prior to § 2255, then, an indigent prisoner seeking habeas relief was entitled to a free transcript, apparently without the certificate needed by the civil indigent. As Professor Sokol has written:

> "It would seem strange to attribute to Congress in its enactment of section 2255 an intent to deprive an indigent prisoner of a right he would clearly have under section 753(f) in the absence of section 2255.[7]

[7]Sokol, The Availability of Transcripts for Federal Prisoners, 2 Am. Crim. L.Q. 63, 66, (1964).

After § 2255 was enacted it was unclear whether § 753(f) provided free transcripts for only those indigents who were preparing appeals. In *United States v. Stevens*, 224 F.2d 866 (1955), the Third Circuit Court of Appeals held that the free transcript clause of § 753(f) was so limited. But the Fourth Circuit Court of Appeals, subsequent to and under the influence of the landmark decision of this Court in *Griffin v. Illinois*, 351 U.S. 12 (1956), held that the district courts did possess power to furnish free transcripts to indigent federal prisoners making a motion to vacate sentence under § 2255, *United States v. Glass*, 317 F.2d 200 (1963). Although *Glass* seemed to rest solely on constitutional grounds, Professor Sokol contended that the court could have rested its decision on statutory construction. 2 Am. Crim. L.Q. at 72. To construe § 2255 proceedings as within the words "criminal or habeas corpus proceedings" in § 753(f) would hardly have been shocking, pointed out Sokol. In any case, the *Glass* decision created a conflict between the circuits. Congress apparently set out to resolve that conflict by amending § 753(f) to include an explicit reference to § 2255 movants, thus making it clear that they too could receive free transcripts.

The stated purpose of this 1965 Amendment to section 753(f) was to authorize furnishing of transcripts at public expense to persons convicted in the United States district court for use by them in § 2255 motions. However, the language adopted created an anomaly:

> "Fees for transcripts furnished in proceedings brought under section 2255 of this title to persons permitted to sue or appeal in forma pauperis shall be paid by the United States out of money appropriated for that purpose if the trial judge or a circuit judge certifies that the suit or appeal is not frivolous and that the transcript is needed to decide the issue presented by the suit or appeal." 28 U.S.C. § 753(f).



The conditions of non-frivolity and need are not present for habeas petitioners. The reasons for these legislatively created distinctions are less than clear:

> "Why do we have these distinctions in the statute? Are they merely careless draftsmanship or the product, so often confusing, of an amendment or compromise during the legislative process, or are the differences intentional and of significance?
>
> "The Committee apparently did not give much consideration to the distinction."

Blackmun, H. A., *Allowance of In Forma Pauperis Appeals in § 2255 and Habeas Corpus Cases*, 43 F.R.D. 343 (1967) 356-357. Probably the addition of these two conditions for § 2255 movants was somewhat inadvertent, because of the apparent conflict with habeas corpus procedures. In a letter of May 27, 1965 from Ramsey Clark, then Attorney General, to Senator Eastland, Chairman of the Senate Committee on the Judiciary, Clark expressed his concern about the added conditions, stating:

> "The reason for this distinction is not apparent if the motion remedy under § 2255 is to be a remedy commensurate with the writ of habeas corpus."

2. U.S.C. Congressional and Administrative News, 89th Congress, 2916 at 2920-21 (1915). Obviously, the Attorney General feared that the section as amended was vulnerable to attack under the suspension of habeas corpus clause of the U.S. Constitution, Art. I, Sec. 9, cl.2.

There is no additional legislative history as to the intent of Congress in amending § 753(f) and the ambiguity is unresolved.

### B. Relationship of § 2255 As Amended in 1965 to Habeas Corpus.

The legislative history of 28 U.S.C. § 2255, as outlined in *United States v. Hayman*, 342 U.S. 205, 210-219 (1952), demonstrates that Congress, aided by the Judicial Conference of the United States, adopted this statute to meet practical administrative problems in habeas corpus cases. District Courts in whose jurisdiction major federal prisons were located were inundated by habeas actions and often geographical removal from the homes of witnesses and lack of access to records of the sentencing court hindered meaningful judicial review. In its "Statement" to the House and Senate Judiciary Committee, the Conference described the § 2255 motion, in pertinent part, as follows:

> This section applies only to Federal sentences. It creates a statutory remedy consisting of a motion before the court where the movant had been convicted. The remedy is in the nature of, but much broader than, *coram nobis*. The motion remedy broadly covers all situations where the sentence is 'open to collateral attack.' *As a remedy, it is intended to be as broad as habeas corpus.* (emphasis added) 342 U.S. at 216-217.



This Court itself summed up the legislative history thus: "Nowhere in the history of § 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their conviction." 342 U.S. at 219. Hence, it is clear that Congress and the Court believe § 2255 exists to provide federal prisoners an avenue of collateral attack commensurate with habeas corpus.

In *Hayman*, this Court did not reach the constitutional question of suspension of habeas corpus, because of the preservation, in the last paragraph of § 2255 procedure is shown to be "inadequate or ineffective to test the legality of his [the movant's] detention." Since the motion remedy has very rarely been held inadequate or ineffective, in effect § 2255 replaces habeas corpus for federal prisoners seeking post-conviction relief. [citing cases] Professor Ronald P. Sokol has concluded: "As a practical matter, section 2255 *is* habeas corpus for federal prisoners" (emphasis added) 2 Am. Crim. L.Q. 63. Therefore the Supreme Court's reliance on the "inadequate or ineffective" savings clause to rebut the suspension argument seems misplaced. Apparently it is still possible for a § 2255 movant to prove the motion inadequate or ineffective, but several Supreme Court cases state that theoretical or abstract constitutionality is insufficient. Perhaps the courts simply believe the motion remedy is adequate in every case to fulfill the purposes of habeas corpus.[8]

As case law and commentators have shown, several significant procedural differences exist between § 2255 and habeas corpus. First, habeas may be sought in the

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[8] C. Wright, Federal Practice and Procedure § 591 "The statutory remedy is adequate and effective."

jurisdiction of confinement, while § 2255 motions must be brought in sentencing court. Second, in a habeas proceeding the prisoner must be present, while under § 2255 the judge has discretion to hold the hearing without the prisoner. As a result, the § 2255 movant must now frequently support his plea *in absentia* by affidavit; the government meanwhile counters the motion orally. See 59 Yale L.J. 1183, 1188 (1950). Although one might expect the judge to mitigate the *ex parte* nature of the proceeding in some way, apparently most federal judges are not disposed to do so. The jurisdictional change to the sentencing court was enacted largely to facilitate refutation of spurious claims by reference to more readily available trial records, according to Circuit Judge Parker, one of the primary draftsmen of § 2255. Parker, *Limiting the Abuses of Habeas Corpus*, 8 F.R.D. 171, 175 (1949). The third procedural difference between the two remedies is that a definite time limit is imposed on Courts and wardens in habeas proceedings; not so in § 2255 motions, which only require "promptness."

### C. Effect of Reading the §753(f) as the Government Construes it Would Be To Suspend the Writ of Habeas Corpus in Violation of Art. I, §9, cl.2.

If the 1965 amendments are read to require a judicial certification of non-frivolity and need before a free transcript will be provided a § 2255 movant permitted to sue or appeal *in forma pauperis*, while habeas petitioners are subject to no such certification requirement under the statute, the remedy cannot be considered commensurate at all. When added to all of



the other procedural inroads made into the right of habeas corpus by enactment of § 2255, this interpretation of § 753(f) as amended in 1965 will have created insurmountable suspension problems under the present scheme by which federal prisoners seek collateral relief. Section 2255 can no longer truly be considered the substantial equivalent of the Great Writ. This Court should be solicitous of the views expressed in *Hayman* and in *Sanders v. United States*, 373 U.S. 1 (1963) to the effect that collateral remedies such as those under § 2255 must be broadly construed, because:

> "... if he were subject to any substantial procedural hurdles which made his remedy under § 2255 less swift and imperative than Federal habeas corpus, the gravest constitutional doubts would be engendered..." 373 U.S. at 14.

No purpose would be served by construing § 2255 proceedings to be subject to greater restraints than habeas corpus since MacCollom and others situated as he is would merely utilize the writ. Accordingly, the Government's position must be that habeas corpus and § 2255 proceedings are both subject to the 1965 amendment requirements. Such a result means that all litigants who assert post-conviction relief under Art. I, § 9, cl.2 are barred if their alleged error is of a general nature such as ineffective assistance of counsel or constitutional lack of sufficiency of the evidence. Such a bar clearly breaches the *Hayman* standards.

The attempt of the Ninth Circuit to avoid such a result (Petitioner's App. p. 8a-11a) is a reasonable one and should be left undisturbed. If the Government's construction is adopted, then 28 U.S.C. 753(f) must be stricken.

## III.

## THE CONSTRUCTION OF §753(f) URGED BY THE GOVERNMENT VIOLATES THE FIFTH AMENDMENT DUE PROCESS CLAUSE BY DENYING FEDERAL PRISONERS ACCESS TO THE CONSTITUTIONALLY GUARANTEED RIGHT TO COLLATERAL REVIEW: Art. I, Sec. 9, Cl. 2.

### A. Effect of §753(f) on MacCollom

An indigent federal prisoner who wants a free verbatim transcript of his criminal trial must satisfy 28 U.S.C. § 753(f) (1970), which provides:

> "Fees for transcripts furnished in proceedings brought under section 2255 of this title to persons permitted to sue or appeal in forma pauperis shall be paid by the United States out of money appropriated for that purpose if the trial judge certifies that the suit or appeal is *not frivolous* and that the transcript is *needed* to decide the issue presented by the suit or appeal." [Emphasis added].

Under the interpretation urged by the Government, § 753(f) contemplates that a federal prisoner must demonstrate both the non-frivolous nature of his claim for relief and his particularized need for a transcript to "decide the issue."[9] "[H]e must show merit, not just personal opinion." Such a showing of merit must appear, of course, in the form of specific allegations of fact constituting error.[10] General allegations are insuf-

[9] *Ellis v. State of Maine*, 448 F.2d 1325, 1327 (1st Cir. 1971).

[10] 7 Conn. L.Rev. 479, 490 n. 74 and cases cited therein.



ficient. Moreover, the inability to make specific factual allegations has effects far beyond the denial of a transcript under the Government's interpretation of § 753(f), because a federal prisoner seeking post-conviction review under § 2255 will surely be denied relief if he cannot substantiate his claimed deprivation of constitutional rights.

This Court has held that a federal court has power to deny a motion to correct or vacate sentence pursuant to 28 U.S.C. § 2255, on the ground that the motion states only bald legal conclusions with *no supporting factual allegations*, even though a better course may be to direct the movant to amend his motion. *Sanders v. United States*, 373 U.S.1, 18 (1963). Moreover, this Court has stated that "where an applicant for a writ of habeas corpus alleges *facts* which, if proved, would entitle him to relief, the federal court to which the application is made has the power to receive evidence and try the facts anew." *Kaufman v. United States*, 394 U.S. 217, 224 (1969) (emphasis added). The clear import of *Sanders* and *Kaufman* is that without supporting factual allegations, a § 2255 petitioner will not have his motion to vacate sentence granted, because the motion will be denied without a hearing or; if a hearing is granted; the petitioner will be unable to substantiate his claim. Although 28 U.S.C. § 2255 provides that [(u)nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto . . . ,"] the motion, files and records of a case do not necessarily contain supporting factual material is

to to be found in the verbatim transcript of the challenged proceeding. The petitioner's inability to obtain such a transcript would preclude his obtaining relief.[11] Despite the Government's contention that "many of the grounds that might arguably support collateral relief either are evident from documents other than the trial transcript or are not reflected in the records at all," cases will surely arise where grounds for collateral relief are evident only from the trial transcript.[12]

[11] The Ninth Circuit Court of Appeals recognized that without a transcript a petitioner would be incapable of discovering error. *MacCollom v. United States*, 511 F.2d 1116, 1117-(9th Cir. 1974). Since a petitioner's inability to obtain a transcript would be due, of course, solely to his indigent status, the indigent federal prisoner is placed in a "paradoxical situation; he must assert non-frivolous grounds to receive a transcript; yet, without the aid of a transcript to which he can refer, his chances of asserting non-frivolous grounds are minimal." 7 Conn. L.Rev. 479, 498 (1975).

[12] For example, in both *Kaufman v. United States*, 394 U.S. 217, 226 (1969) and *Townsend v. Sain*, 372 U.S. 293, 313 (1963) this Court has held that a federal court *must* review constitutional claims presented by federal prisoners if (1) the merits of the factual dispute were not resolved in the federal hearing; (2) the federal factual determination is not supported by the record as a whole; (3) there is a substantial allegation of newly discovered evidence; (4) the material facts were not adequately developed at the federal hearing; or (5) for any reason it appears that the state trier of fact did not afford the applicant a full and fair fact hearing. A transcript would probably be of little aid to a federal prisoner asserting his right to collateral review under ground (3), but a transcript would be helpful to a claim for review under grounds (1) and (5), and essential to a claim for review under grounds (2) and (4). MacCollom, of course, asserts a claim under ground (2).



Most typical of such cases are those in which the alleged constitutional deprivation results from either the ineffective assistance of counsel or a conviction unsupported by the record. These allegations can only be established by a review of the entire record, including a verbatim transcript. As the Ninth Circuit Court of Appeals pointed out, there is no empirical study to support the Government's assumption that a trial transcript is rarely needed to support a collateral attack. *MacCollom v. United States*, 511 F.2d at 1122 and n.5. *See also* R. Sokol, FEDERAL HABEAS CORPUS, App. E[13] (2d ed. 1969). In such cases, the denial of a transcript bars meaningful access to collateral review and, therefore, under *Boddie*. violates the Constitutional guarantee of due process of law.

[13] The Government relies exclusively on *United States v. Shoaf*, 341 F.2d 832 (4th Cir. 1964) in support of its assumption that trial transcripts are rarely necessary to support collateral attack. The author or *Shoaf*, however, unlike the author of the Ninth Circuit's opinion in *MacCollom*, never served as a federal district court judge and, therefore, had no direct experience with screening federal prisoner petitions pursuant to § 2255.

*Ross* is distinguishable from MacCollom on numerous grounds. First, of course, *Ross* dealt with the right to counsel in discretionary appeals, which are clearly not required by the federal Constitution. MacCollom, on the other hand, deals with the right to collateral review, which is expressly granted by the federal Constitution. Second, the function and scope of appeal is significantly different than that of collateral review. Although an appellate court is limited to reviewing assertions of error on the face of the record, which may or may not include a verbatim transcript, the federal court reviewing a petition for habeas corpus or a motion to vacate sentence "has the power to receive evidence and try the facts anew." *Kaufman v. United States*, 394 U.S. 217, 224 (1969). *Townsend v. Sain* 372 U.S. 293, 312 (1963). Thus, the court's reasoning in *Ross*, that strict equality is not required on discretionary appeal because such an appeal is far removed from the fact finding process, is clearly inapplicable to collateral review. [It is more like the original itself.]

**B. Right to Transcript and Due Process**

The most recent case to consider right to transcript under the Due Process Clause of the Fifth Amendment was *Britt v. North Carolina, supra.* In *Britt,* this Court held that access to a transcript on appeal or after a mistrial is established as a matter of law. In *Britt,* it was presumed that an adequate alternative to a transcript was available and, accordingly, due process did not compel production therein. This Court found that North Carolina's interests in preventing frivolous appeals and in conserving state funds outweighed the interests of Britt where an adequate alternative to the transcript existed. *Britt* would obviously have been decided differently had (a) no alternative existed, and/or (b) North Carolina's denial of the transcript was based solely on the failure of Britt to make a showing of need.

*Britt* is analogous to the situation presented by the instant case. No alternative is available or permitted under 28 U.S.C. 753 (b) which requires a transcript to be kept at trial, and appellant's need is therefore presumed from *Britt, supra.* This is especially true of an indigent federal prisoner who, like MacCollom, was tried and convicted, did not appeal, and then seeks collateral relief. Unlike the petitioner in *Britt,* however, MacCollom does not seek to exercise the non-constitutional right to an appeal. *Ross v. Moffitt,* 417 U.S. 600 (1974); *McKane v. Durston,* 153 U.S. 684 (1894). On the contrary, MacCollom seeks to exercise his right to collateral review, which is expressly guaranteed by the Constitution in Article I, Section 9, Clause 2:

> "The privilege of the Writ of Habeas Corpus shall not be suspended, unless in Cases of Rebellion or Invasion the public safety may require it."



The fact that MacCollom seeks relief under 28 U.S.C. § 2255 rather than by Writ of Habeas Corpus is constitutionally insignificant, for this Court has stated that " 'the sole purpose [of § 2255] was to minimize the difficulties encountered in habeas corpus hearings by affording *the same rights* in another and more convenient forum.' " *Sanders v. United States,* 373 U.S. 1, 13 (1963) (Emphasis in original). Indeed, § 2255 is the "statutorily compelled substitute for habeas corpus." R. Sokol, *The Availability of Transcripts for Federal Prisoners,* 2 Am. Crim. L.Q. 63 (1964). *See also United States v. Hayman,* 342 U.S. 205 (1952); *Hill v. United States,* 368 U.S. 424 (1962); Blackmun, *Allowance of In Forma Pauperis Appeals in Section 2255 and Habeas Corpus Cases,* 43 F.R.D. 343 (1967); R. Sokol, FEDERAL HABEAS CORPUS, 180 (2d ed. 1969); Velman, *Post-Conviction Relief for Federal Prisoners: A Survey and a Suggestion under 28 U.S.C. §2255,* 69 W.Va L. Rev. 277 (1967).

The Government contends that an extension of the due process principles of *Griffin v. Illinois,* 351 U.S. 12, and other transcript cases is unwarranted in light of the Court's decision in *Ross v. Moffitt,* 417 U.S. 600. In *Ross* this Court held that the Equal Protection Clause of the Fourteenth Amendment does not require the state to appoint counsel to assist indigent petitioners in the prosecution of discretionary appeals, because the Constitution does not require absolute equality between indigents and those who can afford to pay. But *Griffin* also stands for the proposition that the Due Process Clause guarantees that the poor will not be denied access to those parts of the criminal justice system integral for determining guilt or innocence of a defendant and *Ross* in no way modifies this. The Court in *Griffin* clearly stated that "to deny adequate review

to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside." 351 U.S. at 19.

The principle that an indigent cannot be denied meaningful access to "adequate [direct] appellate review" solely because of his poverty (*Griffin* at 19) has been applied to direct appeals from collateral proceedings, *Smith v. Bennett* 365 U.S. 708 (1961), and to post-conviction review itself, *Lane v. Brown* 372 U.S. 477 (1963). In *Smith* the bar to access was a statutory filing fee for state habeas corpus relief. In *Lane* the bar to access was a state procedure requiring the filing of a transcript for post-conviction review, but which made transcripts available to indigents only by approval of the public defender. MacCollom contends that without a transcript of his trial he is likewise barred from access to post-conviction review pursuant to 28 U.S.C. § 2255 (1970) since the error he wished to assert can only be found and cited with particularity by access to a verbatim transcript.

In *Boddie v. Connecticut*, 401 U.S. 371 (1971), this Court held that indigent divorce petitioners could not be denied access to the courts by statutorily required court fees. *Boddie* analyzed whether such court fees denied indigent divorce petitioners access and, therefore, due process of law by examining both the extent to which the state monopolized the means for legally dissolving the marital relationships and the fundamental nature of that relationship.[14] This court found that "marriage involves interests of basic importance in our society . . ." and that the court was "not only the

[14] 401 U.S. at 374.



paramount dispute-settlement technique, but, in fact, the only available one." (401 U.S. at 377). The right of the divorce petitioners in *Boddie*, the right of MacCollom, and, indeed, the right of any federal prisoner to post-conviction review equally involves interests of basic importance in our society. The provision of federal post-conviction review recognizes "that adequate protection of constitutional rights relating to the criminal trial process requires the continuing availability of a mechanism for relief." *Kaufman v. United States*, 394 U.S. 217, 226, (1969). If the Due Process Clause protects interests of basic importance implicit in the Constitution[15] it must surely protect the right to federal post-conviction review, which is explicitly guaranteed.[16] Thus, the interests of federal prisoners like MacCollom are at least as worthy of protection as the interests of indigent divorce petitioners in *Boddie*, and, therefore, if post-conviction review is the sole means for resolving the "dispute" between such federal prisoners and the Government,

[15] See e.g., *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Meyer v. Nebraska* 262 U.S. 390 (1923).

[16] U.S. Constitution Article I, § 9: "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it."

statutory barriers to access to such review violate the Due Process Clause.[17]

For MacCollom, post-conviction review is the sole judicial forum for the constitutional claims he asserts. While it is true, as the Government points out, that MacCollom could have appealed his conviction, Brief for Petitioner at 19-23, the fact remains that no appeal was taken.[18] It is precisely because the time for appeal has passed that MacCollom is left with a single avenue of relief, Thus, federal prisoners like MacCollom, who have been convicted after a trial, but who have not appealed, are like the divorce petitioners in *Boddie* because there is only one available forum in which to settle their disputes.[19]

Finally, in *Hardy v. United States* 375 U.S. 277 this Court has applied due process principles and balanced the governmental interests in screening frivolous law suits and conserving funds and found the necessity of a transcript for litigants analogous to MacCollom required. In *Hardy*, the provision of a transcript was required for a criminal appellant without a specific showing of need where new counsel on appeal had been appointed. Hardy's new counsel, as did MacCollom's new counsel, required the transcript in order to process the case and this Court held that no other record could be an adequate alternative for the new counsel on appeal. 375 U.S. 278-281.

In light of these decisions emphasizing the balancing of the governmental interests against the necessity for a transcript, the Government's construction of 28 U.S.C. § 753(f) results in denying MacCollom due process of law.

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[17]Both the *United States v. Kras*, 409 U.S. 434 (1973) and *Ortwein v. Schwab*, 410 U.S. 656 (1973) are readily distinguishable from the instant case. In Kras the Court held that petitioners for voluntary bankruptcy are not denied due process of law by the jurisdictional requirement of a fifty dollar filing fee. The Court pointed out that there is no constitutional right to a discharge in bankruptcy, 409 U.S. at 446, and that bankruptcy is not the exclusive means for readjusting debtor-creditor relations. 409 U.S. at 445-446. In *Ortwein* the Court held that a welfare recipient whose welfare payments were reduced following an agency pretermination evidentiary hearing does not have an absolute right to appellate review of the agency's determination. The Court pointed out that "Even in criminal cases, due process does not require a state to provide an appellate system." (citations omitted) 410 U.S. at 660.

[18]The Government contends that "The failure to assert on direct appeal a claim of total absence of evidence to support a conviction almost certainly would constitute a 'deliberate bypass' (*Kaufman v. United States, supra*, 394 U.S. at 227, n.8.) Brief for Petitioner at 38, n.17. While the Court in *Kaufman* did point out that "the § 2255 court may in a proper case deny relief to a federal prisoner who has deliberately bypassed the orderly federal procedures provided at or before trial and by way of appeal . . . ," 394 U.S. at 227, n.8. The issue of deliberate bypass is properly raised only in opposition to a motion to vacate sentence at the district court level. MacCollom has alleged that he was afforded ineffective assistance of counsel,* and, in the absence of a hearing on the issue, the Government's assertion that MacCollom's failure to appeal "almost certainly" constitutes a deliberate bypass is premature and totally unsupported by the record.

*Appendix at 6.

[19]Indeed the Government position if logically extended would completely reverse the constitutional basis of appeal and Habeas Corpus by resulting in the automatic denial of post-conviction relief where the statutory remedy of appeal was not exercised.

## IV.

## THE GOVERNMENT'S CONSTRUCTION OF 28 U.S.C. 753(f) DENIES MacCOLLOM HIS FIFTH AMENDMENT RIGHTS TO EQUAL PROTECTION OF THE LAWS.

The case applying equal protection analysis to transcript issues is *Griffin v. Illinois*, 351 U.S. 12 providing transcripts for indigent appellants. Throughout its recent history, this Court has remained dedicated to the principle of equal justice for all criminal defendants set forth in *Griffin*. *See e.g.*, *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Douglas v. California*, 372 U.S. 353 (1963); *Draper v. Washington*, 372 U.S. 487 (1963); *Smith v. Bennett*, 365 U.S. 708 (1961); *Burns v. Ohio*, 360 U.S. 252 (1959). As the Government points out, this court in *Ross v. Moffitt*, 417 U.S. 600 (1974), most recently delineated the scope of the equal protection clause for indigents. *See* Brief for Petitioner at 8-9. *Ross* in applying the *Griffin* standards relied heavily on two factors overlooked by the Government and which are present to much different effect in MacCollom.

The first factor was the lack of any right to a subsequent discretionary appeal or even any appeal at all, citing *McKane v. Durston* 153 U.S. 684, 417 U.S. at 606. Unlike *Ross*, MacCollom has an absolute guarantee of post-conviction relief in Art. I, §9, cl.2. *Ross*'s reliance upon this difference from *Griffin* is accordingly indicative of the necessity for *Griffin* to apply to MacCollom.

The second factor was the prior appeal of right accorded Moffitt which gave to him a complete trial



transcript, court record, brief by his prior attorney and legal advice concerning his discretionary review application from the prior attorney before his withdrawal. In light of these factors, the right to counsel on the second discretionary appeal by Ross could be weighed against the state's interest in preserving its funds and screening cases because adequate materials for Moffitt's pro-se application were in existence. MacCollom, of course, had *none* of these available to him to aid his *first* attempt at review. Moffitt had the "adequate opportunity to present his claims fairly," 417 U.S. 616; MacCollom had not.

Contrary to the Government's Brief (at 7) that the Ninth Circuit or Respondent believe the test for equal protection is "that review must be available to the destitute and wealthy on an absolutely equal basis;" the proper test, applied below (Pet. App. p. 3a, 15a) and asserted here is that indigents "must be afforded as adequate . . . review as defendants who have enough money to buy transcripts," 351 U.S. at 19, (Pet. App. p. 3a). Since MacCollom cannot frame his claim or exercise his Art. I, Sec. 9, cl. 2 right of collateral review without his transcript, equal protection of the laws requires such.

> "While in *Griffin* the transcript could be waived as a convenient but not necessary predicate to court access, here the State invariably imposes the costs as a measure of allocating its judicial resources. Surely, then, the rationale of *Griffin* covers this case." *Boddie* 401 U.S. 377, 381-82.

If prevention of frivolous suits and conservation of financial resources cannot justify filing fees (see *Smith v. Bennett*, 365 U.S. 708) and as Justice Harlan pointed out in Boddie, the transcripts were mandated by *Griffin* even though they were "not necessary," it is impossible

for these same justifications to bar petitioner where he has no alternative to prepare his case because the nature of his grounds of error are those which can only be revealed by the verbatim transcript (insufficiency of evidence and ineffective assistance of counsel).

## CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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